

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
TOMMY BROWN and)	
CARLTON BRYCE)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENTS)	
)	CASE NUMBER WPC08-0081

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

II.

Carlton Bryce (hereinafter "Respondent Bryce") is the owner property located on Wet Prong Farris Creek Road in Moore County (hereinafter the "site"). Service of process may on Respondent Bryce at 3000 Gant Place, Marietta, Georgia 30068.

III.

Tommy Brown (hereinafter "Respondent Brown") is a resident of the state of Tennessee and is the operator of a cattle-feeding operation located at site. Service of process may on Respondent Brown at 110 Rutledge Road, Shelbyville, Tennessee 37160.

JURISDICTION

V.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

VI.

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and, as herein described, have violated the Act.

VII.

Wet Prong Farris Creek, describe herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

VIII.

T.C.A. § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Further, the state requires a National Pollutant Discharge Elimination System (NPDES) permit for the operation of a Class II Concentrated Animal Feeding Operation (CAFO). Coverage under the Class II CAFO may be obtained by submittal of a Notice of Intent (NOI).

FACTS

IX.

On August 2, 2006, division personnel conducted a site investigation and noted that a CAFO was in operation. Storm water discharge from the CAFO feedlot drained to the unnamed tributary to Wet Prong Farris Creek. Division personnel obtained water samples from the unnamed tributary at locations upstream and downstream of the site. A subsequent file review determined that neither Respondent had requested or been issued coverage under the Class II CAFO for this activity.

X.

On September 5, 2006, the division issued a Notice of Violation (NOV) to Respondent Brown for the violations noted during the August 2, 2006, site visit. The Respondent was instructed to attend a Compliance Review Meeting scheduled for September 9, 2006 at the Columbia Environmental Field Office.

XI.

On September 28, 2006, the division received analytical results of the samples obtained during the August 2, 2006, site investigation from the Tennessee Department of Health – Laboratory Services (TDH-LS). The results for the upstream location were 2600 CFU/100 ml for *E. Coli* and 4600 CFU/100 ml for *Fecal Coliform*. Analytical results for the downstream location were 160,000 CFU/100 ml for *E. Coli* and 60,000 CFU/100 ml for *Fecal Coliform*, constituting a condition of pollution. The analytical results and copies of the lab analysis sheets were forwarded to Respondent Brown on October 9, 2006.

XII.

On November 15, 2006, the division sent correspondence to Respondent Brown detailing the general requirements for CAFO permitting. Specifically, the Respondent was informed that, regardless of the number animals that are fed, a CAFO may not cause pollution to waters of the state.

XIII.

On March 5, 2008, division personnel conducted a complaint investigation and noted that cattle were being fed at the site. No one was present during this investigation and division personnel left a business card on site. Later that day, Respondent Brown contacted the division and stated that 275 head of cattle were being fed on site.

XIV.

On March 7, 2008, division personnel returned to the site during a rain event in order to obtain water samples from the unnamed tributary to Wet Prong Farris Creek and noted that a pipe was discharging mud and waste-laden storm water from the feedlot into a wet weather

conveyance and then into the unnamed tributary. Division personnel obtained water samples from the unnamed tributary at locations upstream and downstream of the site. Analytical sample results received from the TDH-LS indicated concentrations of 727 CFU/100 ml for *E. Coli* and 527 CFU/100 ml for *Fecal Coliform*. Analytical results for the downstream location were 1,733,000 CFU/100 ml for *E. Coli* and greater than 60,000 CFU/100 ml for *Fecal Coliform*, constituting a condition of pollution.

XV.

On March 19, 2008, the division issued a NOV to Respondent Brown for the violations noted during the March 7, 2008, site investigation. The analytical results of the March 7, 2008, samples were enclosed with the NOV. Respondent Brown was instructed to immediately remove the cattle from the feedlot until such time as permit coverage was obtained and effective Best Management Practices (BMP) had been implemented.

VIOLATIONS

XVI.

By failing to obtain coverage under an NPDES – Class II CAFO, the Respondents have violated T.C.A. Sections §§ 69-3-108(b) and 69-3-114(b) which state in part:

T.C.A. § 69-3-108(b)

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or

bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. § 69-3-114(b)

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVII.

By causing a condition of pollution in the unnamed tributary to Wet Prong Farris Creek, the Respondents have violated T.C.A. Section 69-3-114(a), which states:

§ 69-3-114(a)

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall immediately discontinue feeding operations at the site until such time as coverage under the Tennessee General National Pollutant Discharge Elimination System Permit for Class II Animal Feeding Operations, has been issued by the division.
2. The Respondents shall, within 30 days of receipt of this ORDER AND ASSESSMENT, submit a NOI and supporting documents requesting coverage under Tennessee General National Pollutant Discharge Elimination System Permit for Class II Animal Feeding Operations. These documents shall be submitted to CAFO Notice of Intent, Tennessee Department of Agriculture, Ellington Agricultural Center, Nashville, Tennessee 37204 and to the Water Pollution Control, Permit Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
3. The Respondents shall pay a CIVIL PENALTY of TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of receipt of this ORDER AND ASSESSMENT, pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).
 - b. If the Respondents fail to comply with Part XVIII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - c. If the Respondents fail to comply with Part XVIII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.

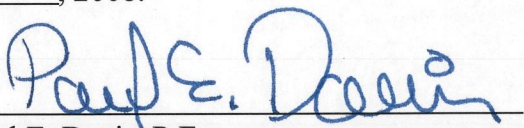
The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER AND ASSESSMENT. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER AND ASSESSMENT is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER AND ASSESSMENT will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this

8th day of May, 2008.


Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

T. C. A. §§ 69-3-109 and 69-3-115, allow any Respondent to secure review of this ORDER AND ASSESSMENT. To secure review of this ORDER AND ASSESSMENT, the Respondent must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Unit, Tennessee Department of

Environment and Conservation, 14th Floor L & C Tower, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.